

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 158 of 1988

with

CRIMINAL APPEAL No 159 of 1988

and

CRIMINAL APPEAL NO. 184 OF 1988

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DAMANBEN MOTIBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 158 of 1988
MS BANNA S DUTTA for the Appellant
MR Y.F. MEHTA, A.P.P. for the Respondent.
2. Criminal Appeal No 159 of 1988
MS BANNA S DUTTA for the Appellant
MR Y.F. MEHTA, A.P.P. for the Respondent.

3. Criminal Appeal No. 184 of 1988

MR J.M. PANCHAL for the Appellant

MR Y.F. MEHTA, A.P.P. for Respondent

CORAM : MR.JUSTICE N.J.PANDYA and

MR.JUSTICE H.L.GOKHALE

Date of decision: 05/12/96

ORAL JUDGEMENT: (Per Pandya, J.)

1. All the four appellants are accused of Sessions Case No.170 of 1986 of the Court of learned Sessions Judge of Kheda, at Nadiad and they all came to be convicted for offence under Section 302 read with Section 34 and 114 of I.P.C as also for offence under Section 201 read with Sections 34 and 114, all of I.P.C. For the offence under Section 302, life imprisonment was awarded and for the second offence sentence of five years has been awarded with a fine of Rs.500/-, and in default, R.I. for six months was imposed. The substantive sentences are ordered to run concurrently.

2. The incident is said to have happened on 19.7.1986 in village Jhalabhai-ni- Muvadi, within the area of Mehmadabad Police Station. Accused No.1-Shardaben is the widow of the deceased, accused No.2 is his daughter and accused Nos.3 and 4 are the accomplices of the first two accused. The deceased was of a quarrelsome nature and he used to pick up quarrels mainly on the ground that why people often visit their house. The visitors included accused No.3 and 4 also. On the day of the incident, it is said that at about 8 P.M. or so, there was a quarrel about the visitors and in course of it, accused No.1 was beaten by a wooden club and accused No.2 was slapped by the deceased. After taking the meals, everyone went to sleep.

3. In the middle of the night, the incident happened in which, according to the prosecution, accused No.1 armed with an iron ban, accused No.2 had a spade and accused No.3 had a Dharia, and making liberal use of their respective weapons, the deceased was done to death. The role attributed to accused No.4 is of holding the feet of the deceased in his cot.

4. According to the prosecution, the dead body, thereafter, was buried nearby the side of a tree in a small pit and, on the next day, it was removed from there and after putting it in a gunny bag, was dragged all the way upto a pond known as Modern Talavadi, near village Dhandhodi.

5. The whole incident, according to the prosecution, came to light when the brother of the deceased-Mohanbhai Roopabhai submitted a report to the Police that his brother-Motibhai Roopabhai is missing since 19th July, 1986. This was preceded by a dead body having been found in a gunny bag near the said Talavadi by the village people of the said village Dhandhodi. When this body was found on 21st July, 1986, the Police, after filling up inquest and getting postmortem done on the spot, in absence of any claimant of the dead body, proceeded to cremate the same and that was done by the villagers of the said village. The body having been cremated on 21st July, 1986, the investigation which was initiated by report of Mohanbhai submitted on 22nd July, 1986, conclusively precluded the dead body being identified and, therefore, connecting with the accused and further conclusively establishing that it was that of deceased-Motibhai Roopabhai.

6. However, on the basis of the material produced before him in the form of oral testimony, Panchnamas, postmortem notes, F.S.L. reports and more particularly what is claimed by the prosecution, eye-witness account of two young children of the accused-appellant No.1, namely, Kanubhai and Kantaben, the learned Trial Judge in his well written elaborate judgment came to the conclusion that the accused are guilty.

7. The learned advocates appearing for the respective appellants, i.e. Ms. Banna Dutta for appellants No.1 and 2 and Mr. J.M. Panchal for accused Nos.3 and 4, have strongly urged that the conclusion arrived at by the learned Trial Judge suffers from many infirmities and, therefore, they strongly pressed that here is a case for acquittal and, in the alternative, they submitted that, looking to the infirmities pointed out above, the guilt cannot be said to have been brought home beyond reasonable doubt.

8. In the aforesaid background of the identity of the body not having been carried out and it was brought to our notice by the learned advocates for the appellants that, P.S.I. Shri Rao of Mahudha Police Station has in

no uncertain terms admitted in the course of his cross-examination, in paragraph 12 (page 179 of the paper book) that neither before cremation nor thereafter and in the course of investigation of the present crime, was the identity of the body ever established. This would be a very grave circumstance against the prosecution.

9. Kanubhai on the date of his examination at Ex.26 was aged 14 years. He is the son of the deceased and accused No.1. Kanta was initially cited as a witness by the prosecution, but it was subsequently dropped. After passing an elaborate order in this regard, the learned Trial Judge decided to examine Kanta as a Court witness and she came to be thus examined at Ex.94.

10. On reading their testimony, it is quite clear that they do support the prosecution story about the incident in the manner described in the opening of this judgment. However, in the cross-examination of Kanubhai, it has come out in very clear terms that the testimony thus given by him is required to be very very cautiously appreciated and evaluated. During his cross-examination, he has admitted that the incident which happened on Friday was followed by his visit to his maternal uncle's place at the instance of accused-appellant No.1 on Monday. This would be on 22nd July, 1986, the day on which the report came to be filed by Mohanbhai.

11. According to this witness, he was sent to his maternal uncle's place by accused-appellant No.1 to inquire about the deceased and his whereabouts. It is this very accused-appellant, who, according to the witness, had threatened that he should not open his mouth else he will meet with the same fate as his father did. Looking to his tender age, one might assume that he was thoroughly terrorized and, therefore, did not utter a word while he was with his mother. At the same time, it may be noted that, there is nothing on record to suggest that he ever had an opportunity of talking to anyone in the interregnum.

12. Taking the position of record as it is and more particularly the said admission in cross-examination that he went to his maternal uncle's place, one would expect him either to blurt out something about the incident or at least behave in the manner as to make people at his maternal uncle's place to suspect something. In spite of that, what he does is that he stays there for about an hour but does not inquire as to the whereabouts of his father. He was especially asked by his maternal grandfather as well as maternal uncle as to why he did

come there all alone, but he did not reply at all to this question.

13. This aspects assumes importance because on 23rd July, 1986, his statement is said to have been recorded by the Police by which time he has started staying with his uncle Ratnabhai. As he wanted to grab the property of the deceased, he has won over the children of tender age and, therefore, they are repeating what they have been tutored by him. We are not concerned with this allegation for the time being. However, of the two, at least Kanta has admitted in her cross-examination that all the three occasions when she came to the Court, her statement was read over by the police to her and that is how her memory was refreshed and, therefore, a gap of one and half years also, her testimony given before the Trial Court was, on all material particulars, corroborating Kanubhai's testimony (Ex.26) and, therefore, one more element and reason why the testimony of these two children should be taken with more caution.

14. We were initially of the view that, if these children had seen the incident, as claimed, then what they could have seen; and on analysis, it appears that they could have seen part of the main incident when the deceased received injuries and, thereafter, the putting of the dead body in the pit and being buried would have been seen by them fully.

15. However, in this regard, the Panchnama of the scene of offence, Ex.39, page 160, indicated that there was a pit of the size of 4' x 2' x 3' and the soil collected therefrom was found stained with blood traces of human origin, as per Ex.55, F.S.L. report. However, deposition of the Panch witness-Kantibhai Hajesing, Ex.38, page 152 of paper book makes the whole exercise of Panchnama of the scene of offence almost redundant. The whole Panchnama of the scene of offence is not drawn at the instance of the Panchas but it records what accused No.1-Shardaben did and what accused Nos.3 and 4 did thereafter. This leads to section 27 of the Indian Evidence Act being not available in favour of the accused and that was what was done by the learned Trial Judge. In our opinion, the learned Trial Judge is not correct in overlooking this vital aspect on the ground that these people were arrested subsequent to the preparation of the Panchnama. The whole exercise of the Panchnama of the scene of offence is in the nature of either discovery or recovery. In any case, it is not a Panchnama as strictly understood in criminal law and none of the actions of the Panchas or the details given by them are to be found in

the Panchnama and that is clearly stated by the Panch witness-Kantibhai Hajesing, Ex.38.

16. The result, therefore, is that blood marks or blood traces found in the soil taken from the said pit would be of hardly any assistance to the prosecution.

17. In this background, what remains on record is that, on the one hand, two children have seen the incident and on the other hand, there is a dead body, which is not shown to be that of the deceased. Unless, therefore, there is a connecting link, merely because the children say what they have seen, straightaway it cannot be presumed that the body recovered is that of the deceased.

18. At this juncture, we may refer to the contradictions that were found out by the deposition of the said Kanubhai in paragraph 17 at page 183, where right from the genesis of the dispute to the part played by each of the accused and the threat having been given given to the witness is all covered.

19. Taking overall view of the matter, therefore, in our opinion, we agree with the learned advocates appearing for the appellants to the extent of their alternative submission that the prosecution has failed to establish the case against the accused beyond reasonable doubt. Once this conclusion is reached, the result will be that conviction will have to be set aside. Accordingly, these appeals are allowed. The order of conviction against the accused is set aside. The accused-appellants are ordered to be set at liberty if not required in any other case. So far as accused No.1 is concerned, she is on bail. Her bail bond is ordered to be cancelled. Fine, if any, paid is ordered to be refunded.

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